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SYMPOSIUM

REFLECTING ON FORTY YEARS OF MERIT SELECTION IN INDIANA: AN INTRODUCTION

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On April 5, 2012, nearly 200 people gathered in the Wynne Courtroom for a remarkable symposium reflecting on the merit selection¹ of Indiana Supreme Court justices and Court of Appeals' judges that began with voter approval of a constitutional amendment in 1970. The symposium brought together national and local presenters and attendees from the judiciary, academia, advocacy groups, and the broader bar. The agenda appears at the end of this article.

I. THE ARTICLES THAT FOLLOW

The symposium explored successes and concerns in the initial selection of judges, subsequent retention elections, and the impact of merit selection on the tenure of those judges. The symposium began with a keynote address from ABA President Wm. T. (Bill) Robinson, who focused on the ABA's goal of preserving "our Founding Fathers' vision of the judiciary as the third, non-political branch and the one safe haven Americans have to resolve a dispute: our courts."² He described the ABA's policy supporting merit selection of judges and guidelines for recusal of judges, two seemingly different but linked issues that "limit the impact, and perceived impact, of political contributions on the outcome of cases."³

Judge Edward Najam next offered a comprehensive and engaging history of the constitutional amendment beginning with the impressive work of the Judicial

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1. The goal of the symposium was to reflect objectively on selecting judges through a seven-member commission comprised of the Chief Justice, three laypersons appointed by the Governor, and three lawyers elected by lawyers from around the state. However, some view the term "merit selection" as "propagandistic" and prefer "the more-neutral 'Missouri Plan'" to refer to a judicial selection system "that lacks confirmation by the senate or similar popularly elected body." Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 761-62 (2009).

2. Wm. T. (Bill) Robinson III, *Justice in Jeopardy: The ABA Perspective*, 46 IND. L. REV. 7, 10 (2013).

3. *Id.*

Study Commission that drafted the judicial article.⁴ The article chronicles the efforts of the bar, the bi-partisan support and bi-partisan opposition in the General Assembly, and the campaign for ratification. The article concludes by reflecting on the effectiveness of four decades of merit selection that has brought “appellate decisions rendered without fear or favor by judges who are not controlled by, or accountable to, any political party or interest group but accountable only to justice and the rule of law.”⁵

K.O. Myers of the American Judicature Society explains the benefits of a diverse judiciary.⁶ At the time of the symposium the Indiana Supreme Court was all-male and had included just one female justice and only two persons of color among its 107 justices.⁷ Mr. Myers’ article surveys not only national statistics and surveys regarding diversity and judicial selection methods but also offers data regarding the diversity of the Indiana Judicial Nominating Commission and list of nominees it has forwarded to governors since 1985.⁸ He concludes that diversifying nominating commissions and placing an institutional value on a diverse judiciary are reasonable and useful ways to improve merit selection systems.⁹

The remaining speakers focused on post-appointment issues, including retention elections and the effect on judging. Judge Melissa May moderated a panel discussion on retention elections after the 2010 Iowa election in which three justices were not retained after a well-financed campaign focusing on their 2009 opinion regarding same-sex marriage.¹⁰ Judge May’s article summarizes that and other retention battles before concluding with ways in which voters can become better informed about retention elections through “large scale education initiatives; judicial performance evaluations, and bar association participation in response to issues set forth in negative ads.”¹¹

James Bopp, Jr., whose article is entitled “The Perils of Merit Selection,” explores many of the pitfalls of merit selection while acknowledging that Indiana has largely avoided those pitfalls “due to the luck of having been blessed with good leaders.”¹² His article ends by advocating for partisan elections as “the best system for choosing judges because it openly and honestly acknowledges the judicial law-making function and encourages candidates to be forthright about their own political ideologies.”¹³

4. Edward W. Najam, Jr., *Merit Selection in Indiana: The Foundation for a Fair and Impartial Appellate Judiciary*, 46 IND. L. REV. 15 (2013).

5. *Id.* at 38.

6. K.O. Myers, *Merit Selection and Diversity on the Bench*, 46 IND. L. REV. 43 (2013).

7. Governor Daniels appointed Justice Loretta Rush as the 108th justice effective November 7, 2012.

8. Myers, *supra* note 6, at 49.

9. *Id.* at 57.

10. Melissa May, *Judicial Retention Elections After 2010*, 46 IND. L. REV. 59 (2013).

11. *Id.* at 81.

12. James Bopp, Jr., *The Perils of Merit Selection*, 46 IND. L. REV. 87, 100 (2013).

13. *Id.* at 102.

The final two articles take different approaches to the issue of judicial recusals in light of recent Supreme Court opinions. A decade ago the Supreme Court held in *Republican Party of Minnesota v. White*¹⁴ that a state could not prohibit judicial candidates from announcing their views. More recently, *Citizens United v. Federal Election Commission*¹⁵ held the First Amendment prohibits the government from suppressing speech based on the speaker's corporate identity, finding unconstitutional a federal statute that prohibited independent corporate expenditures and leading to massive amounts of campaign spending. Professor White posits that "robust judicial qualification rules can remain a strong antidote to the toxic effects of *White* and *Citizens United* if individual judges consider the broad view of the public when ruling on disqualification motions."¹⁶ Because the public's "perception of unfairness . . . promotes disrespect and erodes public trust and confidence in the courts,"¹⁷ judges must view disqualification not in terms of personal fault or an attack on their integrity but rather by asking such questions as "[w]ill the public's impression of justice be affected negatively if I decide the issue?"¹⁸

In contrast, Professor Frank Sullivan, Jr. focuses on the viewpoint of a future litigant and concludes "the best way to assure judicial fairness and impartiality" in light of these decisions "is to use properly structured merit selection systems to select judges rather than popular elections."¹⁹ Merit selection of judges is critical in his view because "the effort to bolster recusal will not solve the threats to due process caused by *White* and the big-money influence of judicial elections."²⁰

II. THE IMPORTANCE OF AN OPEN AND TRANSPARENT PROCESS

As the symposium volume went to press in early 2013, the Indiana Supreme Court had gone through a significant change in membership with three new justices joining the Court in just over two years. I had the privilege to view the nearly 100 first and second-round public interviews for those three vacancies, providing extensive commentary to the Indiana Law Blog and media outlets. The open nature of the proceedings struck me as particularly impressive.

When then-trial judge Randall Shepard applied for the Indiana Supreme Court in 1985, the list of applicants was not public.²¹ Twenty-five years later, the

14. 536 U.S. 765, 781 (2002).

15. 130 S. Ct. 876 (2010).

16. Penny J. White, *A New Perspective on Judicial Disqualification: An Antidote to the Effects of the Decisions in White and Citizens United*, 46 IND. L. REV. 103, 118 (2013).

17. *Id.* at 120.

18. *Id.* at 120-21.

19. Frank Sullivan, Jr., *Assuring Due Process Through Merit Selection of Judges*, 46 IND. L. REV. 123, 140 (2013).

20. *Id.*

21. Michael W. Hoskins, *Justice Selection Process Wasn't Always Public*, IND. LAW. (Aug. 4, 2010), <http://www.theindianalawyer.com/justice-selection-process-wasnt-always-public/>

Commission he chaired not only held public interviews but posted applications online.²² The public nature of the process likely deters some highly qualified applicants from applying and taking the risk their employers or clients will take a dim view of their desire to leave their present employment. As Judge Najam aptly puts it, “[t]he application and vetting process is not for the faint-hearted. Each applicant runs a public and private gauntlet.”²³

A closed or secret vetting process would be damaging to the public’s perception of a commission system. In the absence of information regarding proceedings, the public tends to think that the system is “closed,” and that judges are selected through “the old-boy system” or some other process that has little to do with the qualifications of the candidate.²⁴ As recent commentary from Hawaii, which has one of least transparent processes of all merit selection states noted,

[I]n many parts of the country, the judicial system is under attack by conservative groups seeking to undermine judicial independence. The shift to more transparent selection procedures seems to be a response to those attacks, as state judiciaries attempt to reassure the public that hard questions are asked and answered in a merit-based selection process.²⁵

Although opening interviews to the public and posting applications online bring transparency and arguably legitimacy to the selection process, partisan or other political considerations nevertheless play a role as well. As the former counsels to five governors candidly discussed during the final panel of the symposium, some governors were more involved than others in the commission process. John Whitaker discussed Governor Orr’s very different approach to two appointments, one in which he had a strong favorite at the outset, and the other in which he did not. A decade after those appointments, then-Chief Justice Shepard remarked that Governor Bayh’s expression of public support for candidates during the nomination process discouraged others from applying.²⁶

Not surprisingly, the applicant pool for vacancies since the process has been

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22. See generally Najam, *supra* note 4, at 32-33 (“Applications are now posted online. The Commission conducts public interviews with the candidates that are reported in the traditional press as well as online and in the blogosphere.” (footnote omitted)). Some slight redactions were made to applications, such as home addresses and names of children. Moreover, the many attachments to the application, including grade transcripts and writing samples, were not posted online. The entire applications are, however, available for public viewing, and a number of blog entries with such things as tables of applicants’ law school grades were posted to the *Indiana Law Blog*.

23. *Id.* at 32.

24. Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 *FORDHAM URB. L.J.* 125, 157 (2007).

25. Ian Lind, *Transparency in Judicial Selection Procedures Increasingly Common on the Mainland*, *ILAND* (Jan. 31, 2011), <http://ilind.net/2011/01/31/transparency-in-judicial-selection-procedures-increasingly-common-on-the-mainland/#thash.OpNQoV3.n9PoLe0.dbs>.

26. Greg Kuertman, *Interest Peaks for State’s High Court Opening*, *IND. LAW.*, Apr. 17, 1996, at 1.

more public during the past two decades has largely mirrored the partisan affiliation of the governor, and the Commission “has largely deferred to the party holding the governor’s office and has tended to provide the governor a pool of candidates identifying with the same political party as the governor.”²⁷ That was not the case two decades earlier. Shortly after the new Judicial Article took effect in 1972, the Commission’s Executive Secretary described the first process (a ninth judge on the Court of Appeals) as one where selections “were made without regard to their political backgrounds.”²⁸ He quoted the following internal operational rule of the Commission: “judicial selection or recommendation shall not be based upon partisan political considerations, and at no time will the Commission request or consider information regarding the political affiliation of any person being considered as a nominee.”²⁹

Judge Najam views some amount of partisanship as inevitable, but suggests success “is not whether politics has been entirely eliminated but whether, and to what extent, merit selection has reduced and minimized the role of party politics and interest groups.”³⁰ On that score, the past four decades can be viewed as a success not only by proponents of merit selection but also its critics. Upon the announcement of his retirement, Justice Frank Sullivan Jr. lauded Indiana’s merit selection system, which “lifts up raging moderates.”³¹ Mr. Bopp’s article correctly notes that, although the Commission “has largely deferred to the party holding the governor’s office,” the justices ultimately selected have later “upheld the results of popular elections in election disputes, ruling in favor of both Republican and Democratic candidates, and thereby avoided accusations of partisanship.”³²

In short, Hoosiers should take pride in our independent appellate judiciary where votes are not cast votes “along party lines for political purposes,”³³ and can look to neighboring states for embarrassing examples of the contrary.³⁴

27. Bopp, *supra* note 12, at 100; *accord* Najam, *supra* note 4, at 30 (“Republican governors have appointed appellate judges affiliated more or less with the Republican Party, and Democratic governors have appointed appellate judges more or less with the Democratic Party.”).

28. Norman T. Funk, *Creation of the First Judicial Nominating Commission*, RES GESTAE, Jan. 1972, at 8, 11.

29. *Id.*

30. Najam, *supra* note 4, at 36.

31. *Id.* (quoting Niki Kelly, *New Vacancy on Indiana’s Highest Court*, J. GAZETTE (Apr. 3, 2012, 11:29 AM), <http://www.journalgazette.net/article/20120403/NEWS07/304039978/1002/LOCAL>).

32. Bopp, *supra* note 12, at 101.

33. Kelly, *supra* note 31 (again quoting Justice Sullivan).

34. *See generally* Elizabeth K. Lampier, *Justice Run Amok: Big Money, Partisanship, and State Judiciaries*, 2011 MICH. ST. L. REV. 1327, 1329 & n.3 (discussing the Michigan Supreme Court).

III. AGENDA

8:30 a.m. Welcome from Dean Roberts
 8:40 a.m. Welcome and Introduction of Mr. Robinson by the Honorable Frank Sullivan, Jr., Indiana Supreme Court

9:00 a.m. **Keynote Speaker: ABA President Wm. T. (Bill) Robinson III**

9:30 a.m. The Honorable Edward W. Najam, Jr., Indiana Court of Appeals:
 “Merit Selection in Indiana: The Foundation for a Fair and Impartial Appellate Judiciary”

10:30 a.m. Mr. K.O. Myers, Director of Research & Programs, American Judicature Society, “Diversity in Merit Selection Systems”

11:00 a.m. “Retention Elections after Iowa 2010” (panel discussion)

- The Honorable Marsha Ternus, (former) Chief Justice of the Iowa Supreme Court
- The Honorable Theodore Boehm, Indiana Supreme Court (retired)
- Bert Brandenburg, Executive Director, Justice at Stake
- Professor Penny White, University of Tennessee College of Law

Moderator: The Honorable Melissa S. May, Indiana Court of Appeals

1:30 p.m. Mr. James Bopp, Jr., Bopp, Coleson, & Bostrom: “The Perils of Merit Selection”

2:15 p.m. Professor Penny White, University of Tennessee College of Law,
 “Recusal Reform: An Antidote to *Citizens United* and *White*”

3:15 p.m. “Should Indiana Merit Selection Be Trumpeted, Tweaked, or Trashed? – The Governors’ Counsels” (panel discussion)

- Mr. John Whitaker, Citizen’s Energy Group, (former) Counsel to Gov. Orr
- The Honorable Jane Magnus-Stinson, Southern District of Indiana, (former) Counsel to Gov. Bayh
- Mr. Jon Laramore, Faegre, Baker, Daniels, (former) Counsel to Gov. O’Bannon and Gov. Kernan
- Mr. David Phippen, Bose, McKinney & Evans, (former) Counsel to Gov. Daniels

Moderator: The Honorable Tim Oakes, Marion Superior Court